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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1918.

No. 217.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a decree (Transcript, fol. 99) of the United States Circuit Court of Appeals, Second Circuit, affirming a decree (Transcript, fol. 62) of the United States District Court for the Southern District of New York, in a suit wherein the Railroad Company was complainant, and the Telegraph Company was defendant (242 Fed. Rep. 914, and 241 Fed. Rep. 162).

The bill (Transcript, fol. 3) seeks to require the Telegraph Company to abide by and perform a contract between it and the Railroad Company of

thirty years' standing, a copy of which is annexed to the bill, and which provides for the exchange of services between the companies under definitely specified terms (Transcript, fol. 41). The Telegraph Company had refused to perform a vital part of the contract, viz.: to transmit messages in accordance with the terms of the contract (Transcript, fol. 26), assigning as its ground for refusal certain provisions, as construed by the Interstate Commerce Commission (hereinafter for convenience referred to as the "Commission"), of "An Act to Regulate Commerce", approved February 4, 1887, and the amendments thereto (hereinafter for convenience referred to as the "Commerce Act").

The bill prays adjudication (1) that the contract is lawful and binding; (2) that the Telegraph Company be required specifically to perform the contract; and (3) that the Telegraph Company be perpetually enjoined from violating the contract.

The answer (Transcript, fol. 59) admits the allegations of the bill; alleges certain facts as to the extent of the Telegraph Company's telegraph system; alleges that the Telegraph Company, upon the making of the conference ruling of the Commission on March 28, 1916 (Transcript, fols. 25-26, and hereinafter referred to and discussed), in view of the many and severe penalties which would attach should the Commission's interpretation of the Commerce Act be sustained, felt compelled to adopt and apply such ruling although advised that it is doubtful whether such construction is correct; and says that the Telegraph Company is willing to carry out the contract, but has felt compelled to refuse to carry out the same in the particulars named in the bill by reason of the ruling by the Commission with respect to the limitation upon the right of the Railroad and the Telegraph Company to enter into contracts for exchange of services, and the Telegraph Company thereupon asks the Court to determine

the rights and obligations of the Railroad and Telegraph Company respectively under the provisions of the contract and in accordance with the provisions of the Commerce Act.

The case was heard on bill and answer and the decree granted the prayer of the bill. The Telegraph Company appealed to the U. S. Circuit Court of Appeals, Second Circuit, which Court affirmed the decree. Thereupon, the Telegraph Company having filed assignment of errors, this appeal by it to this Court was allowed.

An Act approved June 18, 1910, entitled "An Act to create a commerce court and to amend the Act entitled 'An Act to regulate commerce', approved February 4th, 1887, as heretofore amended, and for other purposes", effected a number of sweeping changes in the Commerce Act, among which was a proviso (hereinafter for convenience referred to as "the 1910 amendment") which reads:

> "*Nothing in this Act (the Commerce Act) shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.*"

The March 18, 1916, ruling of the Commission, referred to in the answer, held that while carriers might contract for an exchange of services, such services must be exchanged upon the basis of the published rates of the railroad and the reasonable charges of the telegraph company regularly charged to other customers for similar services, except that without reference to such lawful rates and charges a railroad might transport property for a telegraph company for use along the line of the railroad and in the construction, improvement or operation of the railroad.

The question involved, therefore, is whether the performance of the contract is prohibited in any particular by the Commerce Act.

Argument.

The contract provides that the Railroad shall furnish right-of-way to the Telegraph lines; labor in various ways; space, light and heat in its railroad stations; storage facilities in its warehouses, docks and yards for material; the transportation and distribution of material along its lines; pay the Telegraph Company $60,000 a year in cash and perform other services. It provides that the Telegraph Company shall furnish material, poles, wires, cross arms, insulators, skilled labor, patent rights, instruments and other equipment and transmit messages.

The Railroad contends that this contract is entire, that the covenants to be performed on one side are interdependent with those to be performed on the other, that the total of considerations passing from one party to the other were intended to be equivalent to and the counterpart of the total considerations received in return, and that the making and carrying out of such contract are affirmatively permitted by the 1910 amendment to the Commerce Act.

The March 28, 1916, ruling of the Commission distinguishes between "on line" and "off line" services, limiting the word "services" to the transportation of persons and material by the Railroad Company and the transmission of messages by the Telegraph Company. The distinction is that persons and material transported by the Railroad for the Telegraph Company for use by the latter in connection with its lines beyond the lines of the Railroad and the transmission of messages by the Telegraph Company for the Railroad Company to points beyond the lines of the Railroad Company or from points beyond such lines, are "off line" services, and that such transportation in connection with

telegraph lines along the lines of the Railroad and such transmission of messages between points on the lines of the Railroad are "on line" services.

The Railroad contends that such transportation of persons and materials and such transmission of messages are only one of many services exchanged between the companies under the contract and that the distinction by the Commission between "on line" and "off line" services is wholly arbitrary and that no such distinction is made or suggested in the statutes.

The Railroad further contends that to single out from the many services which are to be exchanged, under the contract, these two specific services of transportation of persons and property and transmission of messages, and place restrictions thereon, destroys the contract *in toto*, and that while it was possible for the Congress lawfully so to do, yet that is exactly the opposite of what the Congress intended to do and did do, and that the Congressional intention was to fortify this and all similar contracts in all their parts and to remove any possible question as to their validity.

The question, therefore, narrows down to the interpretation of the Commerce Act as amended. In order that the matter may be set forth in orderly and in what we believe to be the most helpful fashion, the historical method has been used somewhat in the following pages.

Chronology of Legislation, Judicial Decisions and Rulings of the Interstate Commerce Commission Relating to the Issues Herein.

In 1906 the so-called Hepburn Act was enacted amending Section 6 of the Commerce Act, so that said Section read in part as follows:

> "Every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. . . . No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act, nor shall any carrier charge or demand or collect or receive a greater or less *or different* compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time;" (Italics ours.)

In September, 1906, the Commission ruled that only money might lawfully be received in payment for transportation subject to the Commerce Act, whether of passengers or property or for any service in connection therewith (Conference Ruling No. 207, Appendix 45, I. C. C. 57).

In October, 1906, the Commission ruled that the law did not prevent a carrier from giving free or

reduced rate carriage over its own line to contractors for material, supplies and men for use in construction, improvement or renewal work on the line of that carrier, provided such arrangements for free or reduced rate carriage were made part of the specifications upon which the contract was based and of the contract itself (Administrative Ruling No. 208).

In December, 1906, the Commission announced its ruling "In the Matter of Railroad-Telegraph Companies" as follows:

> "Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts with carriers that have come to our attention. *So far as we can now see, the full performance of such contracts by the carriers with whom they are made would not affect any public or private interest adversely.* Nevertheless, the Commission knows of no provision of law now in force that vests it with any authority, or any clause in the law that affords it a reasonable ground, to differentiate 'off the line' service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers. The mere fact that carriers, as a means of securing traffic, making agreements with shippers, tracing their freight cars on the rails of other carriers, communicating with their agents in distant localities, etc., etc., frequently find it convenient to telegraph to points beyond their own right of way and are allowed by the telegraph companies to do so free or at reduced telegraph rates does not make it lawful for a railroad company to grant to a telegraph company free or reduced-rate carriage for its officers, men, materials, or supplies destined for use in a telegraph service on the right of way of other carriers.
>
> The Commission is of the opinion that such contracts with telegraph companies may lawfully be entered into by a railroad or by a group of separately incorporated roads generally rec-

ognized as a 'railway system'; and that, in consideration of the construction, maintenance and operation of a telegraph line upon the right of way of such road or system of roads, which telegraph line such road or system would otherwise be compelled as an operating necessity to construct and maintain for itself, a carrier may accord to such telegraph company free or reduced-rate transportation for such officers, men, materials and supplies of such telegraph company as are required and necessary in connection with the construction, maintenance, and operation of such telegraph lines upon such carrier's own right of way or the right of way of such system of roads.

But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service *off the lines* of such carrier and on the lines or system of lines of any other carrier and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines." (Interstate Commerce Reports, Vol. XII, pp. 12-13.) (Italics ours.)

In June, 1907, the Commission announced its Administrative Ruling No. 219, in respect of transportation of men or property for telegraph companies, in which it referred to and amplified such previous rulings and decisions.

In November, 1907, the Commission announced an Administrative Ruling applying Ruling No. 219 to telephone service and calling upon carriers that had not already done so promptly to file with the Commission copies of all contracts for telegraph or telephone service on their lines. We understand that the existing contracts between the various railroad companies and the various telegraph companies, for the exchange of services, were filed and are now on file with the Commission.

In its Twenty-first Annual Report to the Congress, dated December 23, 1907, the Commission referred to its aforesaid rulings and stated in the language which it had previously used in its December, 1906, ruling and above quoted, that the contracts between the telegraph companies and the carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts of carriers that have come to the attention of the Commission, and that so far as the Commission could then see, the full performance of such contracts by the carriers with whom they were made would not affect any public or private interest adversely, but that nevertheless the Commission knew of no provision of law then in force which vested it with any authority or any clause in the law which afforded it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers (Twenty-First Annual Report, p. 25).

In July, 1908, the United States Circuit Court for the Northern District of Illinois, Eastern Division, announced its decision in *United States* v. *Chicago, I. & L. Ry. Co.* (163 Fed. 114), in which it confirmed the doctrine theretofore announced by the Commission that only money might lawfully be received in payment for transportation. The case

was subsequently affirmed by the Supreme Court (219 U. S. 486).

In its Twenty-second Annual Report to the Congress, dated December 24, 1908, the Commission again referred to its said rulings and report in respect of contracts between railroad and telegraph companies (Twenty-Second Annual Report, p. 129).

In 1908 the Western Union Telegraph Company (this appellant) filed a bill in the United States Circuit Court for the District of Maryland, wherein it sought specific performance by the Baltimore and Ohio Railroad Company (this appellee) of the written contract here in suit. The Railroad in its answer thereto admitted its breach of the contract in the particulars complained of and expressed its willingness and desire to fulfill all its obligations under the contract, but set forth that it was prohibited from so doing by the Hepburn Act under a specific ruling of the Commission interpreting the meaning and scope thereof.

That case was heard on bill and answer, was twice argued and elaborate briefs submitted and argument made by the Commission by express leave of the Court, but before the case was decided the amendatory Act of 1910 was enacted and approved and thereupon the parties to that suit, acting in the belief that the meaning and intent of such amendment were to permit the continued performance by them of their obligations under said contract, consented to the withdrawal of the suit, and said United States Circuit Court for the District of Maryland thereupon entered its decree therein in language as follows:

> "This cause having come on to be heard at this Term of Court, and having been submitted for final decree upon Bill and Answer, and the Court having heard argument of Counsel for both parties, and it appearing that since the hearing there has been enacted by Congress an 'Act to create a Commerce Court, and to

amend the Act entitled "An Act to Regulate Commerce", approved February 4, 1887, as heretofore amended, and for other purposes', and the said Act having been approved by the President on the 18th day of June, 1910, and the complainant having in consequence of certain provisions in said Act which make it in its judgment unnecessary to proceed with the said case, prayed leave to withdraw its suit, it is ordered and decreed this 22nd day of June, 1910, that the complainant have leave to withdraw its said suit without prejudice, the complainant to pay all costs" (Transcript, fol. 24).

The amendment above referred to, enacted and approved in 1910, changed Section 1 of the Commerce Act to read as follows (The additions of 1910 are printed in italics):

"Section 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity except water and except natural or artificial gas, by means of pipe lines or partly by pipe lines and partly by railroad or partly by pipe lines and partly by water, *and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, or to any other State, Territory, or District of the United States, or to any foreign country*, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad. . . .

. . . . . .

All charges made for any service rendered or to be rendered in the transportation of passengers or property *and for the transmission of messages by telegraph, telephone, or cable*, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be un-

lawful: *Provided, That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers, for the exchange of services.*"

" . . . . . .

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly, or indirectly, issue or give any interstate free tickets, free pass or free transportation for passengers except to its employees . . . *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act:*"

In 1912 the Commission ruled as follows:

"Under the Amendatory Act of June 18, 1910, it is provided 'that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services'. Upon inquiry, *Held*, That a railroad company and a telegraph company may exchange services *with respect to strictly company matters on the basis of their agreement*" (Administrative Ruling No. 364). (Italics ours.)

On July 15, 1914, the Commission announced a Conference Ruling, which held that while carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of the railroad as published and the reasonable charges of the telegraph company regularly charged other customers for similar services, except that without reference to such rates and charges contracts may be made for transportation by the railroad for the telegraph company of the property of the latter over the line of the former, when such property is used along the line of the railroad in construction or operation of the railroad.

On March 28, 1916, the Commission promulgated a Conference ruling as follows:

> "Upon inquiry as to whether or not under the provision of Section 1, 'That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services,' a railroad may contract with a telegraph company (including in that term 'telephone, telegraph and cable companies'), to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of Section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or

operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier."

Thereupon, on April 25, 1916, the Western Union Telegraph Company notified the Baltimore and Ohio Railroad Company that because of such ruling it would continue to carry out its contract in respect of the transmission of messages under franks, but would charge for such messages at its regular rates up to the contract allowances, billing the Railroad at full rates for excesses over those allowances (Transcript, fol. 26).

Outline of the Contract.

The contract (Transcript, fol. 41), dated April 15, 1887, copy of which is annexed to the bill, provides in substance:—

That the Railroad shall retain the ownership of "exclusive railroad wires", which included instruments, switches, batteries, loops and connections, as necessary to continue in operation the existing effective telegraphic circuits between the stations and offices of the Railroad in the various places on its route, and also include one wire between Philadelphia and New York and local wires in New York then connecting the various offices and piers of the Railroad.

That the Telegraph Company should maintain at its own cost all telegraph lines covered by the contract, including such "exclusive railroad wires" and such additional wires as either Company might place thereon, the Railroad, however, to furnish the unskilled labor for such maintenance, and the wire and material, not including brackets and cross-arms, for the maintenance of the "exclusive railroad wires". That unskilled labor should not include foremen, linemen, climbers, framers or any other

laborers who require special skill in connection with special telegraph construction and maintenance, but should include all labor to dig holes and set and handle poles and other materials.

That the Telegraph Company should not furnish any tools in connection with such work, and that the Railroad might direct the location of poles, wires and cables on its right of way, the Telegraph Company furnishing the skilled labor and the Railroad the unskilled labor for changes therein.

That the Railroad should have the right to erect additional "exclusive railroad wires", paying the cost of wire, insulators and other material, not including brackets and cross-arms, with provision for sharing expense of relocation of lines.

That the Railroad should not furnish labor in connection with lines not on its right of way, and the Telegraph Company should connect the "exclusive railroad wires" with additional offices, stations and buildings of the Railroad in places along its route and in New York and Brooklyn, and if the Telegraph Company should have conduits available for reaching the Railroad's offices, stations and buildings, it should furnish the Railroad such connecting wires as it might be able to supply in such conduits upon payment by the Railroad of the cost of the wire and of placing same in the conduits and the *pro rata* cost of construction and maintenance.

That the Telegraph Company should furnish the use of its main batteries for the operation of all railroad wires and all instruments, local batteries, stationery and other material for commercial business, and grant the Railroad for use on the railroad wires, the free use of all telegraphic patents ever owned or used by the Telegraph Company, and that the Railroad should furnish instruments, local batteries, stationery and other material for other business.

That the railroad wires should be used only by the

Railroad for its railroad business and not for commercial or public business, except where there was but one wire it might be used jointly by the Companies, railroad messages having precedence, until such joint use might be detrimental to the Railroad, whereupon the Telegraph Company should erect an additional wire for commercial business.

That in all other cases the railroad wires might be used jointly by the Companies with the Railroad's assent when not in use for railroad business. That whenever the railroad wires should be disabled, the Railroad might use jointly with the Telegraph Company any of the commercial wires for transacting its business, such use to continue without cost until the railroad wires had been repaired, but through commercial wires should not be so used except in extreme emergency.

That either Company might maintain stations at such places on the Railroad as it desired. That at all stations of the Railroad it would furnish operators at its own expense, who should act as agents of the Telegraph Company in handling its commercial messages, charging the tariff rates thereon, and render statements and pay receipts exclusively to the Telegraph Company, such employees conforming to the orders of the Telegraph Company.

That whenever commercial business from any office amounted to $3,000 or more a year, the Telegraph Company should provide an operator for such office, who, acting as the agent of the Railroad, should attend to the Railroad's telegraph business without charge so long as one operator could attend to the business of both parties.

That the Railroad should provide free of charge in any station, office, light and fuel for the Telegraph Company, and if one person could attend to the business of both Companies therein, the operator of the Telegraph Company, acting as agent for the

Railroad, should attend to the Railroad's telegraph business without charge and conform to the rules of the Railroad applicable thereto, and if the business grew too large, the Railroad should employ its own operator.

That the Telegraph Company should transmit railroad messages free of charge between places on the Railroad's lines.

That the Telegraph Company should issue to officers of the Railroad designated by its President, annual franks for free transportation of messages relating strictly to railroad business, between points on the lines of the Telegraph Company off the lines of the Railroad to an amount not exceeding $10,000 per annum, calculated at regular day rates. That the Railroad should pay the Telegraph Company one-half of such rates on all messages in excess of that amount, settlements to be made yearly. That the free telegraphic service provided for in the contract should apply only to messages concerning the operation and business of the Railroad and not cover cables or orders for steamer or other accommodations for customers of the Railroad.

That the Railroad should transport free of charge over its lines employees of the Telegraph Company when traveling on its business along said Railroad's lines, and transport free of charge materials of the Telegraph Company for construction of its lines along the railroad, and also material for maintenance of offices of both parties at places along the railroad.

That the Railroad should transport free of charge the employees of the Telegraph Company when engaged in its work and materials for the construction and maintenance of telegraph lines other than those above referred to, whether on or off the lines of the railroad, to an amount not exceeding $10,000 per annum, calculated at current transportation rates, and the Telegraph Company should pay the

Railroad Company one-half such rates on all such transportation of employees and materials in excess of that amount, settlements to be made yearly.

That the Telegraph Company should pay the Railroad $60,000 per year in monthly installments.

That the Telegraph Company should indemnify the Railroad Company against damages arising from injury to persons in the employ or property belonging to the Telegraph Company while being carried free or at half rates on the railroad, and likewise indemnify from neglect in transmission of all messages for any person doing business with the Telegraph Company, and the Railroad should indemnify the Telegraph Company from damages for error in transmission of railroad messages.

That the provisions of the contract should apply to new extensions, exact terms of increased service per mile being specified.

That the Railroad granted to the Telegraph Company the exclusive right of way over its lands, roads and bridges for the construction and maintenance of lines for its commercial business. That the Railroad should keep such right of way clear of undergrowth or obstructions, and would not transport the employees or materials of competing companies except at current rates.

That the management of the Railroad employees engaged in telegraphic duties and employees of the Telegraph Company engaged in maintenance of the lines along the railroad, and the transportation of men and materials therefor, should be vested in a joint superintendent, who should be appointed and whose salary should be fixed by the Railroad, with the approval of the Telegraph Company, which salary should be paid equally by the two Companies. That he should be removable for cause by either party, and that the Railroad should furnish office room, light and fuel for him and each party should supply the clerical force for its own business.

The legal situation at the time of the 1910 amendment.

The law, so far as it related to the Railroad, was, *as interpreted by the Commission*, that the Commission was not vested with any authority to differentiate "off line" service by carriers for telegraph companies from the transportation of merchandise for private shippers, although the Commission announced that so far as they could see, the full performance of such contracts by the carriers would not affect any public or private interest adversely, but that the railroads might transport under such contracts free of charge "on line" freight.

That interpretation was not made because the statute said so. The reasoning on which that interpretation was based was that a railroad, in order to operate, must have a telegraph line along its right of way and if no one else built one, the railroad would have to build a line itself. The Commission, recognizing the importance of these contracts, had gone as far as it could find any argument to support it and had strained the statute, it apparently thought, to permit as much of the contracts as possible to be carried out and the Commission did not permit the fact that public commercial business, entirely extraneous to the railroad, was flashed over the lines, to interfere with this reasoning.

The Commerce Act, so far as it affected the question, provided that all charges for services rendered in the transportation of passengers and property should be just and reasonable (Section 1) and that the railroads should file schedules of all rates, fares and charges for interstate transportation and should not charge or demand or collect or receive a greater or less *or different* compensation for such transportation than such rates, fares and charges (Section 6).

Telegraph companies, however, were free to contract as they pleased, they were not under the Act.

Accordingly, at the time of the 1910 Amendment, these contracts between telegraph and railroad companies were valid as to the telegraph companies, and it was conceded by the Commission that the "on line" provisions thereof were valid as to the railroads.

We contend further that such contracts were also valid as to the railroads in relation to "off line" provisions, that is, that they were valid in all respects.

But we will not take the time of the Court to discuss this point as the 1910 Amendment has rendered it academic. It is sufficient to remind the Court that the point turned on the effect of the insertion by the Hepburn Act of the words " or different" in Section 6 of the Commerce Act.

The record situation at the time of the 1910 Amendment.

The Hepburn Act had been enacted so that the Commerce Act provided that all charges made for any service rendered in the transportation of passengers or property should be just and reasonable (Section 1); that every railroad should file with the Commission schedules showing all the rates, fares and charges for transportation between different points, and that no railroad should charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith than the rates, fares and charges so filed.

The Commission had ruled and the Circuit Court had sustained it, that nothing but money could be lawfully received in payment for transportation of

passengers or property. The Commission had also ruled that a railroad might give free carriage over its own line to contractors for materials and men for work thereon, if specified in a contract for such work.

The Commission had ruled that a railroad might transport free of charge under its contract with a telegraph company materials for use of the telegraph company in connection with its lines along the route of the railroad, that is, "on line" service.

The contracts between the telegraph and railroad companies had been filed with the Commission and the Commission had reported in two annual reports to the Congress that these contracts were *sui generis* and unlike any other contracts of carriers that had come to the attention of the Commission and that so far as the Commission could then see, the full performance of such contracts by the carriers with whom they were made would not affect any public or private interest adversely, but that nevertheless the Commission knew of no provision of law then in force which vested it with any authority or any clause in the law which afforded it a reasonable ground to differentiate "off the line" service by carriers for telegraph companies from the transportation of merchandise or any other form of property for private shippers.

The Congress had repeatedly recognized in legislation dating back as far as 1862, the close and necessary relation existing between railroads and telegraph companies, and the fact that telegraphic facilities are essential to the operation of railroads. This recognition may be found in various acts of the Congress incorporating railroads and granting rights of way through Indian and other reservations. Among such acts are the Pacific Railroad Act of July 1, 1862 (12 Statutes at Large, 489), and the various amendments thereto, which Act provided for the incorporation of a railroad and telegraph company

to construct a railroad and telegraph line from the Missouri River to the Pacific Ocean, and provided that such company might contract with various existing telegraph companies to move their lines on to the right of way established by the railroad company, for the purpose of operating in connection therewith; an Act incorporating the Texas & Pacific Railway Company, approved March 3, 1871 (16 Statutes at Large, 573), which authorized the constructing of a railroad and telegraph line from Marshall, Texas, via El Paso to San Diego, California; the statute approved March 2, 1899 (30 Statutes at Large, 990), providing for the granting of a right of way for a railway, telegraph and telephone line through any Indian Reservation to any railroad company which should comply with the provisions of the Act, and the Act of February 28, 1902 (32 Statutes at Large, 43), granting a right of way through the Indian Territory to Enid & Anadarko Railway Company for a railway and telegraph and telephone line.

These contracts had also been the subject of examination by the Courts. Among such cases are *United States* v. *Union Pacific Ry. Co.*, 160 U. S. 1; *St. Paul, M. & M. Ry. Co.* v. *Western Union Telegraph Co.*, 118 Fed. 497; *United States* v. *Northern Pacific R. R. Co.*, 120 Fed. 546; *Western Union Telegraph Co.* v. *Pa. R. R. Co.*, 195 U. S. 540; *Western Union Telegraph Co.* v. *Pa. R. R. Co.*, 129 Fed. 849.

It was a matter of common knowledge that railroad companies required and enjoyed instant, first hand and unlimited telegraphic service in the operation of their railroads and that the telegraph companies enjoyed the use of the rights of way of the railroad companies throughout the country for the construction and maintenance of their lines, and that in small places the only telegraphic service

afforded to the public was obtainable at the railroad stations and from the railroad employees therein.

It is well settled that the Court will recur to the "public history of the times" when an act was passed, in order to ascertain the reason as well as the meaning of the particular provisions in it. The debates in the Congress are not, however, available for such purpose.

In *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, this Court said at page 79:

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

So in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, at page 318, this Court said:

> "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body (citations).
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and upon occasion, by a resort to the history of the times when it was passed."

So also in *United States* v. *Chicago & N. W. Ry Co.*, 157 Fed. 618, this Court at page 618 said:

> " While the court in construing the law may not inquire what individual members of Congress supposed the bill to mean, it may consult the history of the act and the reports of the committees having it in charge, . . ."

This general proposition is also borne out in various features in the following cases.

Aldridge v. *Williams*, 3 Howard, 9;
U. S. v. *Union Pacific*, 91 U. S. 72;
Platt v. *U. P. R. R.*, 99 U. S. 48;
Church, etc. v. *U. S.*, 143 U. S. 457;
U. S. v. *Union Pacific*, 148 U. S. 562;
T. & P. Ry. v. *I. C. C.*, 162 U. S. 197;
U. S. v. *Trans-Mo. Assn.*, 166 U. S. 290;
U. S. v. *C. & N. W. Ry.*, 157 Fed. 616;
Red, etc., Co. v. *Board, etc.*, 172 Fed. 695;
Standard Oil v. *U. S.*, 221 U. S. 1;
Goodrich, etc., v. *I. C. C.*, 190 Fed. 943;
Red, etc., Co. v. *Board, etc.*, 222 U. S. 380;
I. C. C. v. *Goodrich*, 224 U. S. 194;
Lapina v. *Williams*, 232 U. S. 78;
Tucker v. *Williamson*, 229 Fed. 201;
Woodward v. *Graffenried*, 238 U. S. 284.

The Congress is fairly presumed also to have had available to it the records of the Commission, which included copies of the hundreds of contracts between the many railroads in the country and some telegraph company.

In construing the Amendment of 1910, if there can be a possible doubt as to what the Congress intended, consideration must be given to the "public history of the times", which disclosed, as we have seen above, that every railroad had a contract with a telegraph company providing for the interwoven close relation necessary to the

management and joint use of telegraph lines erected on the railroads' rights of way; that such relationship had been recognized for many years by the Congress in its legislation; that such contracts had been the subject of adjudication by the highest courts of the country and in their general scope had not only escaped judicial censure, but had been specifically enforced; that no one had questioned the validity of such contracts as affecting the telegraph companies and no one had questioned the validity of such contracts as affecting the "on line" service rendered thereunder by the railroad companies, but that the Commission had considered that the "off line" provisions of such contracts, so far as they affected the railroad companies, were not authorized by law, and had reported that fact twice to the Congress, stating that in the opinion of the Commission such contracts were *sui generis* and did not affect adversely any public or private interest, but that the Commission did not feel that there was any provision of law authorizing the Commission to recognize the "off line" features thereof so far as the railroads were concerned. It will be conceded, furthermore, that no person or company had ever complained to any court or tribunal for injury or damage on account of such contracts. The nature of these contracts has been commented on by this Court in the recent case of *U. S.* v. *Erie Railroad*, 235 U. S. 513-518.

That the action of the Congress was responsive to the reports of the Commission seems clearly established by an examination of the Congressional Record with a view to determining just how soon after the filing of such reports the Congress acted. Such examination discloses that on the date of the Twenty-First Annual Report of the Commission, December 23, 1907, the Congress was adjourned and did not meet until January 6, 1908. The report was transmitted

to the House on January 6, 1908, and laid before the Senate on the next day, and in each case ordered printed, but that session of the Congress, which was the 60th Congress, adjourned on May 30, 1908. The second session of the 60th Congress convened December 7, 1908, adjourned December 19, 1908, until January 4, 1909, and adjourned *sine die* on March 4, 1909. Manifestly, there was no substantial opportunity, therefore, to consider the Twenty-First Report of the Commission.

The Twenty-Second Annual Report of the Commission, dated December 24, 1908, did not reach the Senate until January 11, 1909, when it was ordered printed, and on January 13th was taken from the Speaker's table in the House, referred and ordered printed. So there was only a month and a half within which the 60th Congress could act on the Twenty-Second Annual Report before it adjourned *sine die* on March 4, 1909.

Naturally there was no action on the report at the special session of the 61st Congress, convened March 15, 1909, and ending August 5, 1909, called by President Taft's proclamation.

The 61st Congress convened in its regular session on December 6, 1909, and adjourned December 21 to January 4, 1910, and adjourned on June 25, 1910. It was during that time that the amendment in question was enacted.

The amendment to Section 1 of the Commerce Act, not exactly in the form finally enacted, was introduced as House Bill No. 17,536 on January 10, 1910. The substance of a rival Senate Bill No. 6,737, introduced on February 25, 1910, was afterwards amalgamated with it under a Conference report.

So the whole deliberations of the 60th and 61st Congresses, intervening between the reference and order to print the Commission's reports and the in-

troduction of a bill to amend Section 1 of the Commerce Act, covered the following periods:

Twenty-First Annual Report.

60th Congress—First Session.
Senate—144 days.
House—145 days.

60th Congress—Second Session.
Senate—20 days.
House—22 days.
Maximum total—167 days.

Twenty-Second Annual Report.

60th Congress—Second Session.
Senate—52 days.
House—50 days.
61st Congress—First Session.
Senate—144 days.
House—144 days.

61st Congress—Second Session.
Senate—25 days.
House—25 days.
Maximum total—221 days.

(The Twenty-Second Annual Report is assumed to have succeeded the Twenty-First in the attention of the Congress.)

A period must have elapsed between the time when the Twenty-First Annual Report was transmitted to the respective houses of the Congress and the time when it was put in its printed form upon the desks of the members and became material from which legislation might result. Therefore, the maximum of 167 days during which the 60th Congress had before it the Twenty-First Annual Report of the Commission must be reduced to represent the true state of affairs, and a like reduction must be applied to the maxi-

mum of 221 days during which the 60th Congress and the 61st Congress were in session from the time the Twenty-Second Annual Report was put before those bodies until the Amendment of 1910 was first launched, and this period was divided not only between the two Congresses but also among four sessions.

And when this deduction of time is considered, together with Sundays and holidays, and the time incident to the organization of the 61st Congress, the maximum of days above indicated must materially exceed the actual legislative days intervening between the respective reports and the introduction of the bill which finally became the Amendment of 1910.

The Act of June 18, 1910, of which the amendment in question was a part, effected a number of sweeping changes in the Act to Regulate Commerce and was the elaborate bill creating the Commerce Court. There can be no question but that any such bill would necessarily be the product of long and careful investigation and consideration, and the salient fact is that so short a period elapsed between the Commission's reports and the introduction of the amendment in question.

In the light of this "public history of the times", and in response to the suggestions contained in the Commission's report, the Congress enacted the 1910 Amendment, by which it placed telegraph companies under the provisions of the Commerce Act, required that their rates should be just and reasonable, provided that they might classify their messages into various specified classes and such other classes as might be just and reasonable, and charge different rates for the different classes, and then provided "*that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services.*"

The economic situation at the time of the 1910 amendment.

It appears from the record (Transcript, fol. 27) that the telegraph lines operated and controlled by the Telegraph Company comprise over 200,000 miles of poles and cables and over 1,000,000 miles of wire. That upon such system of telegraph lines the Telegraph Company has nearly 25,000 offices, about 20,000 of which offices are railroad offices yielding revenues too small to pay for maintenance separate and apart from the advantages derived from contracts with railroad companies and which but for such contracts could not be maintained as independent telegraph offices and would not, therefore, afford telegraphic facilities to the public. That a very large part of such telegraph system is constructed under and in accordance with approximately 1,300 contracts with approximately 300 different railroads and railroad systems throughout the United States, said contracts being similar in the underlying provisions to the contract annexed to the bill.

If such contracts were destroyed, with the result that the telegraph companies would be obliged to seek rights of way, either on public highways, could they obtain the local rights to do so, or across private rights of way, it would entail not only the expenditure of immense sums of money for the relocation and reconstruction of such lines, besides the acquisitions of such new rights of way, but would also entail the expenditure of immense sums of money for maintenance in excess of the requirements of maintenance of the lines constructed along the rights of way of the railroads, for the reason that the transportation of materials along the railroads' rights of way is a comparatively simple

matter compared with the distribution of the heavy material over private rights of way or along public highways.

All such waste and useless expenditure would necessitate heavy increases in rates for telegraphic service to the detriment of the public. Furthermore, the forced abandonment by the telegraph companies of offices in railroad stations would deprive the public of any telegraphic service whatever in those communities too small to support independent commercial telegraph offices, and still further, the destruction of the lines of telegraph erected on the rights of way of the railroads would require the immediate construction by the railroads of their own telegraph lines at an expenditure of immense sums of money that necessarily, even if obtainable, would be reflected in the rates which the railroads might lawfully demand.

The Congress was therefore confronted with the great public interest involved in the preservation of these contracts as they existed and was advised by the Commission which had investigated them and which had caused them to be filed with it as its public records for examination, that the Commission was unable to see any way in which the full performance of the contracts would affect any public or private interest adversely.

Is it reasonable to suppose that the Congress intended to destroy this complicated and important economic situation? Can any other motive be attributed to the Congress or any other interpretation be placed upon its language than that these contracts should be preserved in their entirety and the legality of them should be placed beyond doubt?

The most cursory examination of the contract here under consideration, and it is typical of all these contracts, discloses the complicated interweaving of the mutual considerations passing from each party

to the other. The Railroad Company furnishes a right of way. A railroad right of way is not public property, though sometimes called a highway and subject to a certain extent to State and Federal control. A telegraph company cannot, therefore, under the Act of 1866 (Post Roads Act) occupy a railroad right of way except by the consent of the railroad or under the power of eminent domain; and in the absence of Federal or State provision for the exercise of such right of eminent domain, the railroad right of way can be occupied with telegraph poles only with the consent of the railroad company. (Judson on Interstate Commerce, 3rd Ed. p. 106; *Western Union Tel. Co.* v. *Penn. R. R.*, 195 U. S. 540).

As was said by Mr. Taggart in his memorandum to the Commerce Commission submitted on the application for the construction of the Conference Ruling of July, 1914 (Brief for the Western Union Telegraph Company filed herein in this Court, pp. 79-80), the railroad

> "furnishes transportation. It furnishes labor in various ways. It furnishes space, light and heat in its railroad stations, storage facilities in its warehouses, docks and yards for material. It furnishes the distribution in connection with the transportation of material along its roads. These are some of the contributions of a railroad company in the way of services and constitute some of the considerations under which telegraph lines have been created and are being operated, maintained and reconstructed as needed. The Telegraph Company on its part furnishes material, poles, wires, cross-arms, insulators, skilled labor in a greater or lesser degree, according to the particular contract, patent rights, instruments and other equipment, and in addition thereto, the transmission of messages in large amounts each year.
>
> In making these contracts necessarily all the considerations on one side are estimated and

compared with all the considerations on the other, and these considerations are as a whole considered by the parties to the contract as being respectively fair equivalents each for the other. It is, therefore, obviously impossible to separate the mere transmission of messages by the Telegraph Company, on the one hand, or the transportation of telegraph material either for use on the line of the railroad or for use off the line of the railroad, by the Railroad Company, on the other."

In the contract in question, after all other mutual considerations are cared for, there is the requirement of the payment by the Telegraph Company to the Railroad of $60,000 a year in cash during the continuance of the agreement. The agreement is for a term of fifty years, with provision for renewals after the expiration of that term for further terms of fifty years by the mere giving of notices.

A contract made in violation of the common or statutory law is incapable of being enforced either at law or in equity; and a contract legal in its inception, but thereafter made illegal by a statute, stands on the same footing as regards any performance thereunder after the taking effect of the prohibitive act. Furthermore, if the illegality goes to only a part of the consideration, still if the contract is entire and the illegal part may not, therefore, be expunged without destroying the whole structure of the agreement, the whole contract is tainted and falls with that illegal element.

Trist v. *Child*, 21 Wall. 441;
Chicago, I. & L. Ry. Co. v. *Southern Ind. Ry. Co.*, 70 N. E. 843;
Bank v. *Owen*, 2 Peters, 527;
Thomson v. *Thomson*, 7 Ves. Jr. 470;
United States v. *Dietrich*, 126 Fed. 671;
American Mercantile Exchange v. *Blunt*, 102 Me. 128;

Kahn v. *Wilhelm*, 177 S. W. 403;
Lowey v. *Granite State Provident Assn.*, 8 Misc. N. Y. 319;
Foley v. *Speir*, 100 N. Y. 552;
Haynes v. *Rudd*, 102 N. Y. 372;
Schwepy v. *Stevens*, 177 Fed. 484;
Union Central Life Ins. Co. v. *Berlin*, 90 Fed. 779.

The contract in question here is entire. The covenants to be performed on one side are interdependent with those to be performed on the other, and the agreement as a whole shows that the total of considerations passing from one party to the other were intended to be equivalent to and the counterpart of the total of the considerations received in return. To attempt, therefore, to sift out from one of these agreements any single provision as, for instance, the transportation of materials that may be routed over the railroad and destined to points beyond its lines, and that is the only point that the Commission attempts to sift out on that side of the contract, and as, for instance, the transmission by the Telegraph Company of railroad messages, which is the only point that the Commission attempts to sift out on the other side, particularly when those features have been so carefully covered and provided for in a way that evidences accurate calculation as to the relative values to the respective parties, is to destroy the contract *in toto*.

The Congress may regulate common carriers, but it cannot make contracts for them. The contract in question provided, as we have seen, for a closely calculated and accurately balanced interchange of services between the parties, which constituted the considerations moving by each party to the other. It may well be that such a contract could be destroyed *in toto* by Congressional action. In fact, since the decisions in the Mottley case (*Louisville & N. Co.* v.

Mottley, 219 U. S. 467) and the advertising cases (*Chicago, Indianapolis & Louisville* v. *U. S.*, 219 U. S. 486), there can be no doubt but that contracts lawfully entered into by a railroad may be so destroyed by act of the Congress, but no such contract can be partially destroyed with the result that the rest of the contract is binding upon the parties. To hold that would be to hold that the Congress may make contracts for the carriers. To hold that would be to hold, for instance, where a railroad had contracted for the purchase of a quantity of steel from the United States Steel Corporation at an agreed price fixed low because for a large quantity extending in deliveries over a period of years, that the Congress might pass a law whereby such railroad would be prohibited from purchasing steel except on annual contracts, and yet the Steel Corporation would be obliged to sell the steel at such reduced price in small quantities and only on annual contracts. This is not the law. If the contract is destroyed in an essential feature, a feature which is of its essence, then it is destroyed *in toto* and to hold otherwise would be to hold that legislative action might *make contracts for parties.*

The Congress is presumed to legislate with an intelligent knowledge of the law and is presumed to know that if one part of an entire contract is made illegal by express statutory provision or by virtue of its being contrary to the rules of law, the entire contract is tainted with the illegality and falls, and it is not to be presumed that the Congress, having before it this economic situation that obtained throughout the country, growing out of the universal operation of the railroads under these contracts, and having in mind the public interests involved therein and the public benefits derived from the existence and operation thereof and the great public harm that would come from the destruction thereof, intended to destroy these contracts in their entirety. The Con-

gress is to be presumed to have known that the very heart could not be cut out of these contracts without their total destruction. Touching on this point the United States Circuit Court of Appeals, Seventh Circuit, in the case of *Chicago Great Western R. Co.* v. *Postal Telegraph Cable Co.* (249 Fed. Rep. 664, at p. 666) said, with reference to a similar contract between those Companies, and which is now before this Court set for hearing on the same day as this case:

> "So entwined and interdependent are the reciprocal obligations and undertakings that no part of the contract is separable from the others. Inasmuch as Congress supposedly was aware of this situation, a confession by appellee that Congress intended to legitimatize the exchange of 'on line' services is a confession, in our judgment, that Congress had the intent to approve the known exchange of services rather than the intent to split the unsplittable and from the fragments to make for the parties a new contract."

Therefore, we contend the Congress did not by the 1910 Amendment intend the construction that has been placed upon that amendment by the Commission, because the Congress did not intend to destroy these contracts in toto and the public benefits flowing from them, which is the necessary result of the Commission's construction.

The reason for the 1910 Amendment.

The Congress knew how the law stood. It knew that these contracts were perfectly lawful as to the telegraph companies. It probably considered that they were lawful as to the railroad companies, but it knew that the Commission had said that they were not lawful as to the railroad companies as to the "off line" provisions. It knew how fatal that interpreta-

tion would be to the public interests, how it would result in needless waste of immense capital, necessarily increasing the cost to the public of both telegraphic and railroad service, in hopeless curtailment of telegraphic service to the public, which service could not be supplied in any other way. It intended to extend a few only of the provisions of the Commerce Act to the telegraph, cable and telephone companies, putting them in the category of common carriers and subjecting them to proper supervision and control, and in doing so it intended to and did clarify the situation and place beyond all question of doubt the legality of these contracts by providing affirmatively that they should be legal.

Forty-four years prior to the Amendment of 1910 the Congress had passed a statute (R. S., § 5263, *et seq.* The Post Roads Act), whereby it gave to telegraph companies the right to construct their lines along the post roads of the Government, which necessarily included railroad rights of way, thus putting these vital instrumentalities of commerce and government beyond the reach of selfish State legislation, and in return exacting of the telegraph companies preferred service for the Government. This statute did not, however, give to the telegraph companies the right of eminent domain and if they desired to occupy post roads belonging to individuals, municipalities or railroads, the consent of the owner was an essential prerequisite for which such owner might demand compensation in money or in kind.

Western Union Telegraph Co. v. *Pa. R. R. Co.*, 195 U. S. 540;

Western Union Telegraph Co. v. *Richmond*, 224 U. S. 160;

Williams v. *Talladega*, 226 U. S. 406;

Town of Essex v. *New England Telegraph Co. of Mass.*, 239 U. S. 313.

This Post Roads Act contemplated and authorized by necessary implication contracts between telegraph companies and the owners of post roads, including railroads, by the terms of which the telegraph company could secure to itself the right to occupy these rights of way, and no limitation whatsoever was placed by the Congress upon the amount or kind of compensation which they should pay. It was since the enactment of this permissive statute that the contract now under question and probably all others of the same type grew up, and by their growth and existence they made possible the erection and maintenance of tens of thousands of miles of telegraph lines which otherwise would have been impossible of realization. This increased means for telegraphic communication, made possible by these exchange agreements, was of an importance to the Government which is scarcely capable of exaggeration.

The Congress knew this and it knew that unless these exchange contracts, which, as we have seen, had been challenged by the Commission, were preserved and legalized beyond all cavil, future expansion of telegraphic communication, resulting in knitting the Government more closely together and facilitating the administration of hundreds of its functions, would be curtailed to a great and disastrous extent. In this knowledge of the immense benefit to the Government of the rapid expansion of telegraph lines lay, beyond all shadow of doubt, one of the most potent reasons for the express legalization of these exchange contracts by the Amendment of 1910.

The meaning of the 1910 Amendment.

We have quoted above the portions of Section 1 of the Commerce Act as amended in 1910 so far as that Section relates to the present case, showing

what language was inserted by the amendment. It would be difficult to see how language could be plainer. The Congress provided not only for the exchange of services between the *corporations*, but it even went further and provided for the exchange of passes and franks between such corporations for the use of the officers, agents, and employees thereof and their families. Can it seriously be argued that the Congress intended that the families of employees may enjoy *free passes* and *franks* and yet that the railroads and the telegraph companies may not pursue their time honored contracts evolved after years of experience and after extended negotiations, nicely balanced as to corporate values accruing to each party, creating for the benefit of the public a countrywide telegraphic service otherwise unobtainable, making for the efficiency of the construction of telegraph lines by using the railroads' rights of way and involving investments of vast sums of money and the building of permanent structures on the properties of the railroad companies? Can it be seriously argued that the Congress intended, particularly in the face of the reports of its Commission that these contracts affected no public or private interest adversely, to destroy these contracts when it used the words "*and provided further, that nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services*"?

A proviso often extends rather than limits legislation. *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174–181. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25–37. *American Express Company* v. *United States*, 212 U. S. 522.

And it must be borne in mind, as we have sought to point out and earnestly urge, that these indivisible contracts cannot be tampered with in part without the destruction of them as a whole.

In this connection, it is well to notice what seems to have escaped the attention of the Commission, that while the contracts speak of "free service" and while the Commission permits such "free service" for "on line" transportation, and while the Commerce Act permits *absolutely free service in the way of free passes and franks* between officers, agents, employees and their families, of railroad and telegraph companies, there is in fact *no free service performed under these contracts by either the railroad for the telegraph company or the telegraph company for the railroad.* "Free" as used in these contracts means that that particular service is absorbed in the general considerations moving from each party to the other. It is not gratuitous service. The Railroad furnishes the right of way to the Telegraph Company. We do not know of what value it is, but its value would run into enormous figures. The Telegraph Company pays the Railroad in one item $60,000 a year for every year of the contract. The Railroad furnishes operators and offices and labor, and the Telegraph Company furnishes its parts of the complicated arrangement, and then to show the nicety with which the mutual considerations are balanced, an upset amount of transportation at regular rates is calculated and it is provided that beyond that a different rate shall be charged, and in the same way, an upset amount of telegraphic service at regular rates is provided and beyond that a different rate shall be charged, but the service and transportation that relate solely to "on line" business and which is called in the contract for convenience "free", is absorbed and provided for as a part of the general exchange of values between these two corporations.

It is contended by the Commission that the exchange of services provided for must be an exchange of such services calculated at the regular rates. *Non constat* if the contract could be analyzed and valuations could be placed upon the rights of way

and all the multitude of services and benefits derived by each of the parties thereto, it would transpire that the services are exchanged at greater than regular rates. But that is not the point.

The first fallacy lies in the idea that the exchange must be measured by dollars.

This Court, in one of the advertising cases, said:

> "The legislative department intended (by the Hepburn Act) that all who obtained transportation on interstate lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends cannot be met otherwise than by requiring transportation to be paid for in money, which has a certain value known to all, and not in commodities or services or otherwise than in money". *Chicago, I. & L. Ry. Co.* v. *U. S.*, 219 U. S. 486, 496.

That case arose before the 1910 Amendment, although the decision above quoted was rendered subsequent thereto, but that case was not referring to any of the "specified exceptions" of the statute. It was discussing the right of a railroad to sell to the public transportation for advertising. These telegraph-railroad contracts were added to the "specified exceptions" and the Congress by the 1910 amendment specifically authorized such companies to exchange services.

To exchange services for services does not require that the services shall be translated into dollars. That would be merely keeping books and not exchanging services at all. If A agrees to exchange with B cattle for grain, to use the example given in Webster's definition of "exchange", A determines in his own mind that an ox is worth to him 100 bushels of grain, and B determines that 100 bushels of grain are worth to him one ox. A does not say to B "I will send you cattle for which I will bill you at

$100 per head, and you may send me grain for which you will bill me at $1 per bushel". To do so would not be *exchange* at all, but the purchase and sale of cattle and grain. A says "I will exchange one ox for 100 bushels of grain".

The word "exchange" has a clearly understood, definite meaning, not only in ordinary conversation but in the legislation and the decisions in this country. The Civil Code of Louisiana, adopting the substance of the old Spanish Code, defines exchange as follows [Article 2660]:

> "Exchange is a contract, by which the parties to the contract give to one another, one thing for another, whatever it be, except money; for in that case it would be a sale."

The old Civil Code drafted by Mr. Field for the State of New York, but which was never adopted, defined exchange as follows:

> "Exchange is a contract by which the parties mutually give or agree to give one thing for another, neither thing, or both things, being money only." *Field's New York Civil Code*, § 903.

Exactly the same language has been adopted by the Civil Codes of the following States, the provision in California having been enacted as far back as 1872, viz.:

> Civil Code of California, § 1804;
> Civil Code of North Dakota, § 6003;
> Civil Code of South Dakota, § 1348;
> Civil Code of Montana, § 5129.

In the old case of *Buffum* v. *Merry*, 4 Fed. Cases, 605, Circuit Judge Story in the Circuit Court for the Rhode Island District, said:

> "What is a sale or exchange? Blackstone says it is a transmutation of property from one man to another in consideration of some price

or recompense in value. If it be a commutation of goods for goods it is more properly an exchange."

The distinction has been recognized by the highest courts of the following States among others:

Supreme Court of Alabama.

"Where one article or set of goods is intended to be exchanged for another, no price being attached, it is not a sale, for the transaction is, in the first instance, made by an exchange of goods without reference to money payment." *Coker* v. *the State*, 8 Southern Rep. 875.

Supreme Court of Arkansas.

Chief Judge English in *Cooper* v. *the State*, 37 Ark. 412, at page 418 says:

"A sale is an exchange of goods or property for money paid or to be paid. Barter and exchange are of about the same meaning. Barter —the exchange of one commodity or article of property for another. Exchange of goods—a commutation, transmutation, or transfer of goods for other goods as distinguished from sale, which is a transfer of goods for money."

This case was cited with approval in *Meyer* v. *Rousseau*, 47 Ark. 463.

Supreme Court of California.

"'Sale' in law has a well defined meaning and trustees empowered to sell real estate are not authorized to exchange it for other lands." *Chapman* v. *Hughes*, 134 Cal. 641, 657.

Supreme Court of Indiana.

"The exchange of one article for another is a barter, but the question of price does not necessarily enter into the transaction and in that respect a barter differs from a sale." *Forkner* v. *the State*, 95 Ind. 406.

Supreme Court of Iowa.

In *Beardsley* v. *Cottrell & Babcock*, 43 Ia. 194, at page 204, the Court says:

> "Sale means at all times a contract between parties to pass rights of property for money, which the buyer pays, or promises to pay the seller. *Williamson et al.* v. *Berry*, 8 Howard, 544; *Bigley* v. *Risher*, 63 Penn. St., 155. Where a party mortgages a chattel with power of sale, he is entitled to the excess of the proceeds of the sale over the amount of the debt secured, and the mortgagee has no right, without the consent of the mortgagor, to barter the mortgaged property for other, or to compel the mortgagor to take in anything else than money the excess in value of the mortgaged property over the debt secured."

Supreme Court of Mississippi.

In distinguishing exchange from sale, the Supreme Court in *State* v. *Austin*, 23 Southern Rep. 34, says:

> "A sale means at all times a contract between parties to give and pass rights and property for money."

Supreme Court of Nebraska.

Laboree v. *Klosterman*, 33 Neb. 150.

The charge in the court below was in the following language:

> "To sell property is to transfer it from one to another in consideration of a price paid or agreed to be paid in current money. A sale differs from a barter in this; that in a barter the consideration instead of being in money is paid in goods or merchandise susceptible of a valuation."

The Supreme Court, in approving such charge, said:

> "The Court drew the proper distinction between 'barter' and 'sale'. If the notes were

paid for in money it was a purchase and sale. If the consideration for the transfer of the notes to Lewis was other notes, then the transaction was an exchange or barter."

In New York.

Mr. Justice Gaynor in *Moran* v. *James*, 20 Misc. 235, says:

> "In the law of principal and agent authority to sell does not imply authority to exchange. This so accords with common understanding that it is difficult to find that a case has arisen about it. *McMichael* v. *Wilkie*, 18 Ont. App. R. 464. The same is the case with the law of powers and trusts. A power of sale in a will or trust deed does not authorize an exchange or a mortgage." (Citing several New York State cases.)

In *Elwell* v. *Chamberlin*, 31 N. Y. 611, at page 624, the Court of Appeals in the concurring opinion by Mullin, *J.*, says:

> "In Chitty on Contracts, 374, it is said, the difference between a sale and exchange is this, the former is a transferring of goods for money, the latter for goods by way of barter. In either case, the same rules of law are prescribed for regulating the transaction. In Domat's Civil Law, exchange is defined to be 'a covenant by which the contractors give to one another one thing for another, whatever it be, except money; for in that case, it would be a sale.' In exchanges of one kind of chattels for another, it is impossible to establish usury, because chattels have no fixed value; parties may call the value of them what they please, and so long as there is no standard by which to ascertain and determine their real worth, it cannot be said, that usury is taken, even if it applied to any dealing except loans."

Supreme Court of Ohio.

Jenkins v. *Mapes*, 41 N. E. 137.

> "True, a barter usually consists of an exchange of commodities differing from each other in kind; and doubtless most frequently mutual delivery of the respective articles occurs contemporaneously. These conditions, however, though the usual, are not necessary incidents of a barter; a transaction being equally a barter if goods of the same kind are exchanged and the delivery by one party is to be made in the future as though they were of different kinds and the delivery made simultaneously by both parties when the bargain was made. The distinguishing feature of a barter is that goods are exchanged for goods instead of money; and to constitute a transaction a barter it is no more essential that the delivery should be made by both parties at the time the bargain is made than it is necessary, in order to constitute a sale, that the price should be paid contemporaneously with the delivery of the goods which are the subject of the transaction. Bouvier says of barter that it differs from a sale in that a barter is always of goods for goods, a sale is of goods for money or for money and goods. In a sale there is a fixed price, in a barter there is none."

Supreme Court of Pennsylvania.

In the case of *Jermyn* v. *Elliott*, 45 Atl. Rep., at page 950, the Court says:

> "A clear, explicit and unambiguous contract and a taking of possession under and in pursuance of the contract are as much requisites of a parol exchange as of a sale. But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. It has no relation to or dependence on any other subject. The evidence of possession taken of it is, therefore, confined to the single subject and if not taken in a reasonable time or so as to make it doubtful whether it is attributable to the contract the parol sale is not taken out of the statute. But an

> exchange necessarily has a subject on each side which stands related to the other. One is the representative of the other. So much so that the law implies a contract of warranty by the act of exchanging."

Supreme Court of Vermont.

> "This count alleges a sale with warranty. The evidence shows an exchange. These are legally different contracts and in strictness an averment of one is not supported by proof of the other." *Vail* v. *Strong*, 10 Vt. 457, 465.

Supreme Court of Wisconsin.

In *Long* v. *Fuller*, 21 Wis. 121, at page 124, the Court says:

> "The argument of the respondent's attorney is, that this word 'exchange' is used in the letter of attorney as in common conversation in reference to trade or traffic in chattels. Even when so used, if used with precision, it means a commutation of goods for goods; for if goods are transferred for money it is a sale. And although sometimes in loose conversation, persons may speak of exchanges of goods when a small part of the value is paid by one of the parties in money, yet, we apprehend, seldom or never when the greater part is paid in money."

Exchange is made in kind and depends upon the bargain. Exchange implies merely a relative value. The very word means that what are given and received are valued by the parties to the transaction in terms not of money but of the things exchanged. The values are not the *sale* values, but the *exchange* values. The exchange values have nothing to do with nor do they necessarily have any relation to the sale or market values. That a service is of great value to one does not prove that it is of any value to another. That anything is of great value to one does not prove that it is of any value to another.

But the statute is not barren of help on this point. Every word of a statute must be given effect provided it develops no internal contradiction in the enactment and does not thwart the obvious intention of the Legislature. In *United States* v. *Ninety-nine Diamonds*, 139 Fed. 961, the Court at page 963 says:

> "Cardinal rules for the interpretation of the law are that the intention of the legislative body should be ascertained and given effect, and that this intention must be deduced, not from a part, but from the entire statute which expresses it, because the legislature did not express its intention by a portion, but by all the law upon the subject. An interpretation which restricts this deprivation clause to the guilt of 'any wilful act or omission' flies in the teeth of the maxim that 'all the words of a law must have effect, rather than that part should perish by construction.'"

In *Van Patten* v. *Chicago, M. & St. P. Ry. Co.*, 81 Fed. 545, 547, the Court says:

> "The intent of Congress is to be gathered from a consideration of the entire Act, and not solely from detached portions thereof, and the familiar rule of construction is to be followed, to wit, that, in determining the meaning of the words employed, the general purpose of the Act and the evils sought to be remedied must be always kept in mind, and, furthermore, parts of the Act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the Act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose."

The statute itself is not barren of help as to what is meant by exchange. The amendment says that "nothing in this Act shall be construed". Section 2 of the Commerce Act provides that if any common carrier subject to its provision shall by any special rate, charge, demand, collect or re-

ceive a greater or less compensation for any service rendered in transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him *a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions*, such carrier shall be deemed guilty of unjust discrimination, which is prohibited.

Section 3 of the Commerce Act provides that it shall be unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person or any particular description of traffic in any respect whatever or to subject any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

It is apparent, therefore, that it is not every special contract between a railroad company and another that is condemned by the Commerce Act regardless of whether it injures another or not or whether it be reasonable or not, but to be within the condemnation of the statute such special contract must be inherently vicious or either the actual or potential means of injury to others.

When Section 2 declares that special rates shall not be tolerated, it qualifies it with the words "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions".

The necessary implication from this is that if the service between two or more persons is not like or contemporary or if the transportation is of a different kind and made under different circumstances and conditions than the services rendered another, then special contracts governing such special conditions may be made without violating any law or legal principle.

So when Section 3 says that it shall be unlawful for any common carrier to give any undue or unreasonable preference or advantage, the necessary inference is that if the preference or advantage given is not undue or unreasonable, then it may be given under a special contract governing special circumstances.

Mr. Justice Shiras discussed the second and third sections of the Commerce Act and the propriety of recurring to the history of the legislation in reaching conclusions as to the proper construction of statutes, in the case of *Texas & Pacific R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, at page 218, *et seq.*

As was well said in one of the briefs submitted in the Maryland case between these same parties, in discussing the effect of the words "or different" (compensation) in the Hepburn Act, before the saving provision of the 1910 amendment had been enacted:

> "These sections clearly reveal the purpose of Congress,—a wise and beneficent purpose. It is from these sections, and from the statute as a whole, that the intention of Congress must be derived and not from a single word, dropped like a grain of sand in a delicate and complicated mechanism.
>
> The railroad and telegraph are the Siamese Twins of commerce, born at the same period of time, developed side by side, united by necessity; and we respectfully submit that what the laws of trade and usage have thus joined together it could not have been the purpose of Congress to put asunder by the mere use of the words 'or different'. So radical and revolutionary a change would have been expressed in plain and unmistakable language."

It is proper now, since the enactment of the Amendment of 1910, to add that because the Commission had raised the question and had ruled that

the purpose of the Congress was to put asunder what the laws of trade and usage had joined together, the Congress took practically the first opportunity after its attention had been called to this ruling to assert in positive language that such had not been its purpose, and that it meant that nothing in the Act should be construed to prevent these contracts.

The second fallacy in the interpretation by the Commission lies in the understanding of what is meant by "services". "Service" as defined by the Century Dictionary is "an advantage conferred or brought about; the performance of any office or labor for another; assistance rendered". Webster defines "service" as "advantage conferred; benefit".

We have already noted what some of these services are that are performed by the parties to this contract and which they exchange in accordance with the terms thereof and in accordance with the express authority of the statute. To repeat, some of them are, on the part of the Railroad, the furnishing of a right of way, the furnishing of transportation, of labor in various ways, skilled and unskilled, of space, light and heat in its stations, of storage facilities in its warehouses, of docks and yards for material, of distribution in connection with the transportation of material along its routes; and on the part of the Telegraph Company, of material, poles, wires, cross-arms, insulators, skilled labor, patent rights, instruments and other equipment, and the transmission of messages.

The Commission seems to assume that the word "services" refers merely to the transmission by the Telegraph Company of telegraphic messages and the transportation by the Railroad Company of freight and passengers, but these are only a part of the services that are contracted for under the contracts and that are agreed to be exchanged.

And how may these services be valued except by

the parties to the contract? There is no provision in the Commerce Act for filing rates or fares or charges in respect of any of such services that are to be performed by the Railroad Company, other than the transportation of passengers and property. In fact, the statute is limited to the filing of "schedules showing all the rates, fares and charges for *transportation*". There is no provision, even were it possible to do so, by which the service of furnishing the right of way to the Telegraph Company may be measured or as to which a schedule can be filed or by which the services for furnishing labor or offices or heat or light or tools may be ascertained or the schedules therefor filed.

It was the intention of the Congress in all the legislation developing into the completed Commerce Act to refer to the public interests, to protect and safeguard the public interests, and to guard against favoritism between the carriers, as *quasi* public corporations, and it was not the Congressional intention to strike down these *sui generis* contracts, which do not affect any public or private interest adversely, and thereby to deliver an irreparable blow to the public interests.

Behind this interpretation by the Commission there lurks the inbred fear that in some way the railroads intend to indulge, if given the chance, in a carnival of dissipation of their assets and of distribution of favors and preferences. We find the same underlying fear in the mind of the learned counsel for the Commission, expressed in the consideration of the so-called Pass Case. This Court in that connection in its opinion (*United States* v. *Erie Railroad*, 236 U. S. 259, at pages 271, 272), said:

> "Counsel for the United States sounds an alarm at such extension and lets imagination loose in portrayal of its consequences and sees included 'tap lines and other industrial rail-

roads, street car lines, local traction companies, omnibus transfer companies and herdic lines, hackmen, boatmen, ferrymen, truckmen, lumber flumes, bucket lines for ore, parcel deliveries, district messenger services, carriers of all descriptions, both in this country and abroad '—a formidable enumeration, it must be admitted. And there must be included, too, all their officers, all their employees and their families. There is, however, an opposing picture. It is conceded that carriers subject to the act may interchange passes, the officers and employees of each carrier receiving free transportation, and giving it to every other carrier subject to the act, making an army of the privileged with the same discrimination and the same burden on the passenger service of the railroads as in the illustration of the Government. There is no argument, therefore, in a comparison of the possibilities under one construction rather than the other. At best it is but a comparison of the excesses which may be but are not likely to be practiced. *Counsel seem to think that the railroads have an eager desire to distribute passes and burden their transportation service with a crowd of free passengers. Congress certainly had no such view and gave power to exchange passes, considering that the best safeguard against its abuse was the interest of the carriers. The cases at bar are a typical instance of its exercise. It has its justification in a strictly business policy, and instead of being a burden upon the resources of the companies it is an aid to them.*" (Italics ours.)

To give the statute the interpretation contended for by the Commission would be to rob it of all meaning.

The amendment was not needed to accomplish the result contended for by the Commission, which amounts merely to the keeping of books of account between the companies. The Telegraph Company

could certainly transmit telegrams for the Railroad and bill them at usual rates, just as it transmits them for all of its large customers and bills them each month, and the Railroad could certainly move freight for the Telegraph Company and bill it monthly at published tariff rates. It required no proviso to authorize either transaction, and so to give the statute that interpretation is to say that the statute accomplished nothing and meant nothing and added nothing to the law. Courts will not indulge in such construction of statutes. They will assume that enactments are made for some purpose.

The distinction made by the Commission in its March 28, 1916, conference ruling as to "on line" service is unwarranted. That such a construction was not the one intended by the Congress is clear from the language of the amendment. That language is that nothing in the Act shall be construed to prevent telephone, telegraph and *cable companies* from entering into contracts with common carriers for exchange of services. There is no "on line" service that a railroad can perform for a *cable* company, that is, no service in hauling freight to be used by the cable company along the line of the railroad, nor any service in transporting passengers to work for the cable company along such line of the railroad. The cable company does not operate along the line of a railroad. The Congress made no distinction between "on line" and "off line". If "on line" service may be lawfully performed under the terms of the contract, then "off line" service may be so performed. The United States Circuit Court of Appeals, Seventh Circuit, in *Chicago Great Western R. Co.* v. *Postal Telegraph Cable Co.* (*supra*) said (249 Fed. Rep. 666):

> "Appellee is a telegraph company. But cable companies are included in the same terms. Appellee enumerates 'on line' services it renders

for appellant; but so far has failed to state how an undersea cable could be of 'on line' service to a railroad, or how a railroad could be of 'on line' service to a cable. Appellee's contention that the proviso authorizes nothing but contracts for exchange of 'on line' services (services on a common or joint right of way) therefor comes to this: Railroad and cable companies are authorized to contract with each other, but only for the performance of unperformable conditions."

The complainant-appellee has no adequate remedy at law.

There is no adequate remedy at law unless it is an affirmative remedy Even though the Railroad, if sued by the Telegraph Company for full rates for telegrams irrespective of the provisions of the contract, might set this contract up as a defense and therein have the whole question determined, yet it is not obliged to do that. The test is, can the Railroad set up this question in a suit at law instituted by itself? Manifestly it cannot, and, therefore, it has no adequate remedy at law and is entitled to invoke a court of equity not only for the specific performance of the contract, but also to enjoin a multiplicity of suits:

Bank of Kentucky v. *Stone*, 88 Fed. 383;
United States Life Ins. Co. v. *Cable*, 98 Fed. 761;
Schmidt v. *West*, 104 Fed. 274;
Mutual Life Ins. Co. v. *Pearson*, 114 Fed. 395;
Union Life Ins. Co. v. *Riggs*, 123 Fed. 312.

Conclusion.

It is respectfully submitted that the reason assigned by the Telegraph Company that because of the promulgation by the Commission of the Conference Ruling of March 28, 1916, it would not continue to carry out the contract in all respects and in accordance with the terms thereof, is not well founded and is not a valid excuse for failure to observe the contract; that the contract is not prohibited by the Commerce Act, but in each and every part is expressly authorized by the terms thereof and is lawful as to both parties thereto in all respects; that the Telegraph Company is without legal excuse for its failure to fulfill its obligations under the contract in every respect, and that the Railroad, being without adequate remedy at law, is entitled to judgment requiring defendant specifically to perform its contract accordingly and that the decree should be affirmed.

Respectfully submitted,

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